UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CLARICE K. ATHERHOLT,
(Petitioner),

DANA CORP.,
(Employer) **Case No. 8-RD-1976**

and

INTERNATIONAL UNION, UAW
(Union)

ALAN P. KRUG AND JEFFREY A. SAMPLE,
(Petitioners),

Case Nos. 6-RD-1518 and 6-RD-1519

METALDYNE CORPORATION
(METALDYNE SINTERED PRODUCTS),
(Employer)

and

INTERNATIONAL UNION, UAW,
(Union)

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION: In its Order Granting Review, the Board identified **four** criteria that provide compelling reasons to reconsider the "voluntary recognition bar" and the extent, if any, to which an employer's voluntary recognition of a union should be of "bar quality."

> [W]e believe that [1] the increased usage of recognition agreements, [2] the varying contexts in which a recognition agreement can be reached, [3] the superiority of Board supervised secret-ballot elections, and [4] the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised herein.

Dana Corp., 341 N.L.R.B. No. 150, at 1 (2004).

It is therefore stunning that the Brief of the UAW and its amicus AFL-CIO (hereinafter "UAW Brief") states that:

> [T]he decision granting review cites **three** factors as justifying revisiting this venerable precedent: (1) 'the increased usage of such agreements,' (2) "the superiority of Board supervised secret-ballot elections,' and (3) 'the varying contexts in which a recognition agreement can be reached.'

(UAW Brief at 1, emphasis added). Tellingly, the UAW's formula **omits** the Board's fourth stated criteria, "the importance of Section 7 rights of employees." 341 N.L.R.B. No. 150 at 1.

This blatant omission of "the importance of Section 7 rights of employees" is more than a "Freudian slip." Simply stated, the UAW and its amicus know well that they cannot defend the "voluntary recognition bar" and simultaneously defend **employees'** § 7 right to join a union or freely refrain from doing so, since they are inherently incompatible. This is especially true under the facts of these cases, where the UAW and the respective employers colluded to reach secret deals to pre-ordain that the UAW would be anointed as representative of the employees.[1]

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[1] The UAW also errs when it claims that the Petitioners in these cases "agreed" that no evidentiary hearings should be held by the Regional Directors. ("Consistent with the practice in representation cases in which a bar applies, no evidentiary hearing was held. *All parties agreed* and the Regional Directors found that the Employers had voluntarily recognized the union." UAW Brief at 2, emphasis added). In fact, Petitioners never agreed to waive any hearings.

The UAW's omission of "employees' § 7 rights" is an admission that it has no answer to the pivotal issue posed by the Board's Order Granting Review: Can the "voluntary recognition bar" survive in the face of the NLRA's central focus and paramount purpose, which is to allow employees to freely select or refuse union representation under § 7? Pattern Makers League v. NLRB, 473 U.S. 95 (1985) (policy of the Act is "voluntary unionism"); International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (employees' paramount right to select or reject a union should not be left in "permissibly careless employer and union hands"); In re MV Transportation, 337 N.L.R.B. 770 (2002) (rejecting the so-called "successor bar" that stripped employees of their ability to call for a secret-ballot election).

Instead of expressing even an iota of concern for employees' § 7 right to choose or reject a union, the briefs of the UAW and its various amici exalt "industrial peace" as the paramount purpose of the NLRA. (See, e.g., Dana Brief at 3, asserting that the purposes of the NLRA are "providing stability in collective bargaining relationships, and promoting industrial peace;" Metaldyne Brief at 10, claiming that "the overriding policy of the NLRA is industrial peace," and that, at 15, "industrial peace . . . trump[s] Section 7 rights"). Sadly, what these parties really mean when they argue for the centrality of "industrial peace" is preserving their ability to cut secret backroom "pre-recognition" deals that satisfy the self-interests of unions and employers, not the interests of employees. But the Board must remember that "unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions." MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting); see also Levitz Furniture Co., 333 N.L.R.B. 717, 728 (2001) ("employers' only statutory interest is in ensuring that they do not violate § 8(a)(2) by

recognizing minority unions").

Employee rights and preferences, as protected by § 7, are barely a blip on the radar screens of the UAW and its various amici. This is apparent from the UAW's unabashed support for a policy that permits employer-recognized unions a "reasonable time" to negotiate, "regardless of an interim loss of majority or an intervening claim of another union." (UAW Brief at 7). It is also shown by the amicus Brief of General Motors, DaimlerChrysler, Ford and Delphi, at 10, which decries the fact that their bargaining could be "mooted with the premature ouster of the recognized union," as though the ouster of a **minority** union is a "bad" thing, something to be disfavored by labor law.[2] While outmoded policies that enforce bargaining by minority unions may ensure "institutional stability" for the UAW and the employers that collude with it, those policies surely destroy employees' paramount § 7 right to select a particular union or reject unwanted representation. It is time for the Board to reject these policies. It is time for the Board to again place employees' § 7 rights where they belong, at the pinnacle of the Act's considerations, not at the bottom.

II. ARGUMENT: As noted above, the Board's Order Granting Review identified four factors that provide compelling reasons to reconsider the "voluntary recognition bar." As Petitioners did in their Brief on the Merits, their instant Reply Brief will discuss those four factors in order, with

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[2] The Amicus Brief of General Motors, DaimlerChrysler et al. at 2, 13, also repeats the canard that "these consolidated cases do not involve any allegations of coercion, misrepresentation, or other wrongdoing in connection with the showing of majority support." This assertion is demonstrably false – the Declarations of Clarice Atherholt and Lori Yost attached to Petitioners' Brief on the Merits make precisely these allegations. It is true that these employees did not file unfair labor practice charges to challenge this conduct, but, as pointed out in Petitioners' Brief on the Merits at 41-45, that was because the employees seek a prompt election by the Board, not a long and drawn out ULP prosecution.

other matters discussed thereafter.

A) The Increased Use of "Voluntary Recognition Agreements" Counsels in Favor of the Board Strictly Scrutinizing Them

In its Order Granting Review, the Board noted that these cases differed from prior precedent because here, "an agreement was reached between the union and the employer *before* authorization cards, evidencing the majority status, were obtained." 341 N.L.R.B. No. 150, at 1. Nevertheless, the UAW and its various amici argue that the creation of **pre**-recognition agreements and their increased use are not relevant factors in deciding the fate of the "voluntary recognition bar," and they criticize the Board for mentioning these things. (UAW Brief at 28-33; Dana Brief at 23-24, asserting that "the fact that the voluntary recognition was preceded by a neutrality agreement . . . does not raise any novel issue of law").

The UAW and its allies are wrong. The Board's analysis must take into account the fact that: 1) unions and employers are striking such pre-recognition agreements with increasing frequency; 2) such agreements are often kept secret from the very employees they target[3]; 3) these agreements undoubtedly diminish employees' § 7 rights by, inter alia, limiting robust

[3] See Declaration of Petitioner Clarice Atherholt (attached to Petitioners' Brief on the Merits) who was denied access to the secret agreement targeting her.

debate, favoring one particular union, and denying secret-ballot elections[4]; and 4) these agreements expressly and completely excise the Board from the union selection or rejection process. Surely the prevalence of such secret deals, and their inherent harm to employees' § 7 right to freely choose or reject a union, raises questions worthy of reconsidering past precedent.

Indeed, voluntary recognition of a union in the aftermath of such a secret deal is cause for great concern by the Board and the affected employees. Top-down organizing is repulsive to the central purposes of the Act, see Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 632 (1975) and Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 663 n.8 (1982), and such top-down organizing tactics increase exponentially the potential for abuse of employees' § 7 rights. See, e.g., Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003), enforced, No. 03-1156, 2004 WL 1238336 (D.C. Cir. June 10, 2004) (employer unlawfully assisted its favored union, UNITE, and unlawfully granted recognition); SMI of Worcester, 271 N.L.R.B. 1508, 1519 (1984), citing Majestic Weaving Co., 147 N.L.R.B. 859, 860, 866 (1964) (negotiating with a union prior to the achievement of majority representative status constitutes "impressing upon a non-consenting majority an agent granted exclusive bargaining status," even though the negotiations may be conditioned on the union being able to "show at the 'conclusion'

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[4] See the record in a related case currently pending before the Board, Cequent Towing Products (United Steelworkers of America), Case No. 25-RD-1447 (Order Granting Review dated June 8, 2004). There, the secret pre-recognition "neutrality" agreement (denominated as a "Side Letter and Framework") required the employer to favor the Steelworkers union in organizing the employees (none of whom had previously shown interest in Steelworker representation) with in-plant access, with employees' names and addresses, with gags on employer speech, and with assurances of a "union security clause" once the union is recognized. In exchange, the Steelworkers provided the employer with pre-negotiated limits on the wages and benefits employees can attain after they are organized, a waiver of employees' right to strike, and investments in the employer of $25 million of employees' pension money from the Steelworkers' ostensibly independent pension fund.

that they represented a majority of the employees"). The pre-recognition negotiations occurring in these cases is not appreciably different from those condemned by the Board in SMI of Worcester and Majestic Weaving.

Nevertheless, the UAW and its allies claim that such pre-recognition agreements "advance the national labor policy of . . . honoring voluntary agreements reached between employers and unions." (UAW Brief at 23). They are wrong, for several reasons.

First, the policy of "honoring voluntary agreements," enshrined in § 301 of the NLRA, 29 U.S.C. § 185, more properly relates to the enforcement of existing collective bargaining agreements between employers and incumbent unions than to pre-recognition agreements between non-majority unions that are desperate to cut any deal in order to secure incumbency, and employers desperate to avoid such unsavory union tactics as "corporate campaigns." See, e.g., Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, 430 U.S. 243 (1977); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Gateway Coal Co. v. UMW, 414 U.S. 368 (1974). It is only in recent years that the federal courts have haphazardly expanded § 301 jurisdiction to include the enforcement of pre-recognition agreements, even where they directly impinge upon the Board's representational jurisdiction. See, e.g., Service Employees Int'l Union v. St. Vincent Medical Center, 344 F.3d 977 (9th Cir. 2003) (even though the union lost an NLRB supervised secret-ballot election, it nevertheless was able to force an employer to "arbitrate" challenges and objections to the election before a private arbitrator instead of before the NLRB); New York Health & Human Serv. Union, 1199/SEIU v. NYU Hosp. Center, 343 F.3d 117 (2d Cir. 2003) (same). Clearly, the federal courts have gone too far in enforcing pre-recognition agreements, and it is time for the Board to say so.

Indeed, without guidance from this Board, federal courts applying § 301 have simply assumed the validity of these pre-recognition agreements, largely without detailed analysis. See, e.g., HERE Local 57 v. Sage Hospitality Res. LLC, 299 F. Supp. 2d 461 (W.D. Pa.), appeal pending, No. 03-4168 (3d Cir. 2003) (City of Pittsburgh pressured hotel operator to sign a neutrality and card check agreement as a condition of approving the public financing necessary to complete its project, even directing the hotel operator to contact specific HERE officials to negotiate this mandatory arrangement); but see Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) (California "neutrality" law held preempted after the Board filed a brief urging that result). The Board can and should curtail the abuses inherent in such agreements.

Second, even if pre-recognition agreements between self-interested unions and employers are deemed enforceable under § 301, the Board need not hold that **employees** – who are not parties to those agreements – should have their § 7 rights curtailed as a result. There is no reason for the Board to subject innocent employees to draconian "election bars" that prevent their free choice simply because the employer and union chose to strike an enforceable cozy deal between them.

One recent case involving these same parties demonstrates the principle that employees' § 7 rights remain unaffected by these pre-recognition deals. In International Union, UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002), the UAW sued Dana under § 301 to enforce a provision in one of their collective bargaining agreements which mandated "neutrality" (an employer gag rule) at company facilities. Dana objected to the enforcement of this neutrality provision, arguing that it "effects a waiver of its employees' statutorily protected rights under § 7 of the NLRA, 29 U.S.C. § 157." 278 F.3d at 559. The Court of Appeals dismissed this defense

and held that Dana was bound to the bargain that it had made. But, the court noted that "[a]s § 7 grants *employees* the right to organize or to refrain from organizing, however, it is unclear how any limitation on Dana's behavior during a UAW organizational campaign could affect Dana's employees' § 7 rights." Id., emphasis in original. In other words, the Sixth Circuit recognized that the employees retain their own § 7 rights to support or oppose unionization, regardless of any deal made by Dana and the UAW. While employers and unions remain free to craft whatever otherwise lawful pre-recognition agreements they choose, those bilateral agreements cannot limit the employees' paramount rights under §§ 7 and 9(c)(1)(A)(ii) to avail themselves of the Board's protections.

Finally, the UAW's Brief contains a parade of hypothetical horrors about what "may" occur if the voluntary recognition bar is overruled or changed in a way that frees employees to demand secret ballot elections under §§ 7 and 9(c)(1)(A)(ii). (UAW Brief at 7-10). But notwithstanding its own parade of horrors, the UAW is forced to admit that "stripping voluntary recognition of the long-attached [voluntary recognition] bar would not render voluntary recognition unlawful." (UAW Brief at 28). Thus, even if the Board adopts Petitioners' position, the UAW and its "partner" employers may continue to negotiate whatever otherwise lawful pre-recognition agreements they choose. The only difference is that these two parties will no longer be able to conscript unwilling employees to the terms of those deals and completely shut the NLRB and the employees out of the union selection (or rejection) process.

In short, the Board is correct to scrutinize "voluntary recognition agreements" because of their increasing use, propensity for abuse, and manner in which they excise the Board from the representational process. The Board must hold that "voluntary recognitions" between employers

and unions cannot serve as a "bar" to employees' exercise of their own rights under §§ 7 and 9(c)(1)(A)(ii) because they are simply not of "bar quality."

B) The Varying Contexts in Which a Recognition Agreement Can Be Reached Counsel in Favor of the Board Strictly Scrutinizing Them

The second factor the Board sets forth is "the varying contexts in which a recognition agreement can be reached." The briefs of the UAW, Dana and Metaldyne, however, are largely silent on this point as well. To them, apparently, all agreements between unions and employers are equally valid and beyond reproach, so the context in which the agreements are reached is irrelevant.[5] For example, Metaldyne blithely asserts that all pre-recognition agreements make for "better labor relations" and help "polish up the corporate image," Metaldyne Brief at 4, without admitting that there are a myriad of union and employer motivations behind such agreements.

Indeed, the UAW and its allies refuse to recognize that employers and unions often enter into pre-recognition agreements with less than pure motives. This includes avoiding the "stick" of union pressure tactics like corporate campaigns, and/or obtaining the "carrot" of sweetheart collective bargaining agreements in the future. See Daniel Yager & Joseph LoBue, Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century, 24

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[5] Metaldyne asserts that pre-recognition agreements are so economically beneficial that "some cities have passed ordinances that require companies doing business with them to commit to neutrality (and card check recognition) in the event of an organizing drive." Metaldyne Brief at 5. What Metaldyne fails to mention is that local and state ordinances which attempt to bludgeon employers into such pre-recognition agreements are preempted and unconstitutional, precisely because they skew the labor relations' playing field in a manner contrary to the NLRA. See, e.g., Aeroground, Inc. v. City & County of San Francisco, 170 F. Supp. 2d 950 (N.D. Cal. 2001); Chamber of Commerce v. Lockyer, 225 F. Supp. 2d 1199 (C.D. Cal. 2002), aff'd, 364 F.3d 1154 (9th Cir. 2004). It should be noted that the Board filed a brief in Lockyer supporting the invalidation of the "neutrality" statute.

Empl. Rel. L.J. 21 (Spring 1999); Symposium: Corporate Campaigns, 17 J. Lab. Res., No. 3 (Summer 1996). As is self-evident, none of these union or employer motivations for entering into pre-recognition agreements is to effectuate **the employees'** § 7 interests in a free and unfettered choice as to union representation (or nonrepresentation).

This is amply demonstrated by the amicus brief filed by the Wackenhut Corporation. Wackenhut's brief includes stark evidence of how one aspiring union, the SEIU, is attempting to leverage its § 9(a) collective bargaining status in one market (Chicago) into a nationwide "neutrality and card check" agreement encompassing 38,000 employees in units across the United States. Of course, creating "neutrality agreements" covering other bargaining units is not a mandatory subject of bargaining.[6] SEIU's conduct vis-vis Wackenhut constitutes a grotesque and unlawful power grab against **employees'** § 7 rights, made even worse by the fact that SEIU wants Wackenhut to agree in advance to also sign SEIU's "master" collective bargaining agreement. (See Wackenhut Amicus Brief, Ex. 1, ¶ 2; see also Majestic Weaving Co., 147 N.L.R.B. 859, 860, 866 (1964)). Not a single one of the targeted Wackenhut employees has chosen SEIU, and not a single one of them has been consulted about whether he or she wishes to be covered by the provisions of SEIU's "master" labor agreement. Nevertheless, that power-hungry union is striving to force the **employer** to bind tens of thousands of **employees** to a specific collective bargaining agreement that they may well oppose. Can it be said that SEIU's attempts to bludgeon Wackenhut into both a "pre-recognition agreement" and a post-recognition collective bargaining agreement foster the employees' § 7 right to choose or reject a union? The

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[6] Lone Star Steel v. NLRB, 639 F.2d 545, 556-59 (10th Cir. 1980); Pall Biomedical Prod. Corp., 331 N.L.R.B. 1674 (2000), enforcement denied, 275 F.3d 116 (D.C. Cir. 2002).

answer is a resounding "NO," especially when considering that not a single Wackenhut employee has chosen SEIU or otherwise consented to any aspect of its proposed backroom arrangement.

Other amici report similar overreaching and coercive pressure by national labor unions to obtain "neutrality agreements," including the UAW. See Brief of Allied Security at 2 (discussing SEIU's attempts to secure neutrality and card check); Brief of the HR Policy Association at 20-26 (describing a variety of corporate campaigns and similar tactics designed to organize employers, not employees); Brief of Associated Industries of Kentucky at 12-18 (same).

Even the briefs of amici supporting the UAW make a similar point, albeit inadvertently. The Brief of Liz Claiborne, Inc. states:

> We have a card check procedure in place covering specific units of workers. The use of card checks was just one agreement reached during **a complex negotiation, after rigorous debate**. Within the context of a contract negotiation, **an employer may find it beneficial to compromise** and accept use of a card check.

Id., emphasis added. Thus, Liz Claiborne entered into this "card check agreement" because it was beneficial to the **employer's** interests, not the **employees'**.[7] Moreover, one wonders what specific concessions Liz Claiborne and its union exchanged during this "compromise" on card check. Did the union agree to reduce employees' future wages in exchange for a reliable stream of dues income? Did the employer avoid a corporate campaign and the attendant bad publicity? While Petitioners are uncertain as to exactly what was "compromised" by Liz Claiborne and UNITE in exchange for the "card check" agreement, they can be certain that effectuating employees' § 7 right to freely choose or reject a union was not of utmost concern to these

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[7] Interestingly, Liz Claiborne's letter brief recognizes the potential for manipulation in card check campaigns. The company also opposes the "Kennedy-Miller" bill to mandate card checks.

"rigorously debating" parties.[8]

In short, the Board is correct to note that pre-recognition agreements arise in a wide variety of contexts, all of which are fraught with coercion and overreaching against employers and employees, and all of which ultimately sacrifice employees' ability to select or reject a union under laboratory conditions. This surely counsels in favor of strict scrutiny by the Board.

C) The Superiority of Board Supervised Secret Ballot-Elections Is Beyond Dispute

The third factor cited by the Board is the superiority of the secret ballot election. 341 NLRB No. 150, at 1. Again, neither the UAW or its amici argue that a card check procedure is a **better** gauge of employee sentiment than a secret ballot election, for to do so would be absurd.

> There is no doubt but that an election supervised by the Board which is conducted secretly and presumably after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee, to go along with his fellow workers.

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[8] Petitioners' dim view of the Liz Claiborne and UNITE "compromise" (and similar union-employer compromises that serve their interests but diminish employees' paramount § 7 rights) is reinforced by the letter brief filed by two academicians, Adrienne Eaton and Jill Kriesky. Echoing the Liz Claiborne letter brief, they state that employers can bargain for "weaker" neutrality clauses as they "assess the 'business case' in deciding whether or not to agree." (Eaton/Kreisky Letter Brief at 3). The two professors never answer the question why employees' § 7 rights should be diminished or otherwise subjected to horse-trading between unions which covet more dues payors and employers looking to make a good "business case."

Additionally, the "research" cited by Eaton and Kreisky is obviously one-sided. For example, they note that in their first study, published in the Industrial and Labor Relations Review (October 2001), they interviewed union organizers about their experiences under neutrality agreements. Not surprisingly, these union organizers praised such agreements. But the professors apparently did not think it important to interview **employees** to see if they agreed with the negotiation and enforcement of such pre-recognition agreements, with the secrecy and employer gag rules that often accompany them, or with the attendant union pressure on them to sign cards in the absence of a secret ballot election. Like the UAW and their other amici, employees' § 7 rights appear as a distant blip on the professors' radar screens.

NLRB v. Cayuga Crushed Stone, 474 F.2d 1380, 1383 (2d Cir. 1973); NLRB v. Gissel Packing Co., 395 U.S. 575, 602 n.20 (1969) (recognizing "the acknowledged superiority of the election process"). Not surprisingly, recent polling data shows that "a majority of **union members** polled would prefer secret-ballot elections over card-check recognition." New Survey Says Union Members Prefer Secret-Ballot Elections Over Card Check, Daily Lab. Rep., July 22, 2004.

Instead of simply admitting the superiority of the secret ballot election, the UAW repeats the truism that "since the passage of the Act, the Board and the courts have recognized that employees may demonstrate majority support for a union by means other than a Board election." (UAW Brief at 3-4; 12-15). But this rote incantation of "the legality" of some voluntary recognitions does not address the questions of whether they are **superior** (or even equivalent) to NLRB-supervised secret-ballot elections, and, most importantly, whether they are of "bar quality" so as to shut out the Petitioners from the elections they seek.

Rather than face this issue, the UAW argues that unions brought in by an employer's voluntary recognition should not receive "less protection" than those which arrive via secret-ballot elections. But in arguing for the "equivalency" of card check recognition, the UAW refuses to admit that the conditions in a union "card check campaign" are not equivalent – and are, in fact, inferior – to the laboratory conditions which prevail in Board-supervised secret-ballot elections.

Indeed, of necessity the UAW and its amici oppose application of the "laboratory conditions" standard to card check recognition, because they know that no "card check campaign" could pass muster under this standard. See, e.g., Fessler & Bowman, 341 N.L.R.B. No. 122 (May 12, 2004) (recognizing the potential danger when a union official merely touches a

ballot, the Board sets aside an election and creates prophylactic rules to ensure the integrity of the election process). All card check campaigns are inherently coercive, precisely because they lack the requisite safeguards – like secret-ballot voting – that make Board elections the only standard entitled to "bar quality." Id.

Contrary to the misrepresentations in the UAW's brief, Petitioners are not arguing that an NLRB election is the "only" way a union can come to represent employees. (Emphasis added by UAW Brief at 16, taking out of context Petitioner's argument in the Dana Petition for Review at 10). Petitioners recognize that § 9(a) allows for union "designation or selection." Even the UAW concedes that if Petitioners' positions are upheld by the Board, "stripping voluntary recognition of the long-attached bar would not render voluntary recognition unlawful." (UAW Brief at 28).

What Petitioners argue, however, is that "voluntary recognitions" are not of "bar quality," and that when employees call upon the Board to decide a "question concerning representation," the appropriate policy is for the Board to allow such elections and not blindly defer to the self-interested determinations of employers and unions as to the employees' preferences. International Ladies Garment Workers v. NLRB, 366 U.S. 731, 738-39 (1961) (employees' paramount right to select or reject a union should not be left in "permissibly careless employer and union hands").

In short, the superiority of Board elections is unquestioned in this case. Only such elections are entitled to "bar quality."

D) Employees' § 7 Rights Are Paramount Under the Act

As noted in the Introduction, supra, the briefs of the UAW and its amici ignore the centrality of employees' § 7 right to freely choose or reject a union. For example, the Amicus Brief of General Motors et al. frames the issue as follows: "the recognition bar doctrine . . . is essential for the maintenance of industrial peace and stability." (General Motors et al. Brief at 2). Of course, the UAW and the "Big Three" automakers make no assertion that the "the recognition bar doctrine is essential *for the maintenance of employees' § 7 rights*," since such an assertion would be patently absurd. As noted at the outset, and despite their claim to support a "balance," the UAW and its amici believe that employees' § 7 right to freely choose or reject a union is entitled to little or no weight in any analysis. Petitioners respectfully believe to the contrary, that the *raison d'etre* of the Act is the protection of employees' § 7 right to freely choose or reject a union. Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers . . . .") (emphasis in original); MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting) ("unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions.").

In sum, there is no doubt but that the purpose of the Act is to protect employees' paramount statutory rights under § 7 of the Act, and no "balancing of interests" can diminish these rights.

E) Response to the General Counsel's Proposals:

In his Amicus Brief, the General Counsel properly recognizes that "there are important differences between establishing majority status through Board elections and establishing

majority status to [sic] [through] card checks." (G.C. Brief at 2). The General Counsel also recognizes, properly, that "a Board conducted election provides the most reliable basis for determining whether employees desire representation by a particular union." (Id. at 3). Finally, the General Counsel recognizes that card checks are "less reliable" than elections because they lack secrecy and procedural safeguards, and because employees can be subject to "group pressures." (Id. at 3-4 & n.4; see also id. at 9-10).

Having said this, however, the General Counsel proposes only a "limited exception" to the voluntary recognition bar. Unfortunately, the General Counsel's exception is itself too limited, and in the end inadequate and unacceptable to protect employees' paramount § 7 rights. According to the General Counsel's proposal, employees faced with an employer's recognition of a chosen union should have only 21 days after recognition is announced to gather a showing of interest signed by 50% of the employees, and only another 9 days thereafter to file a formal decertification petition with an NLRB Regional Office. This proposal is inadequate for the following reasons:

1) As the General Counsel himself points out, in a union card check drive, "authorization cards are typically collected during the organizing campaign over a period of time." (G.C. Brief at 9). Indeed, as the instant cases demonstrate, union "card check campaigns" can stretch on for months while unions try to pressure employees to sign. For example, the record in the related case currently pending before the Board, Cequent Towing Products (United Steelworkers of America), Case No. 25-RD-1447 (Order Granting Review dated June 8, 2004), shows that when the union was unable to collect the requisite cards during an initial 60-day period granted by the employer under the "neutrality agreement," the employer compliantly gave

the union an additional 60 days to collect more signatures. And of course nothing would have stopped the "neutral" employer from extending that deadline too, again and again. What this means is that a union favored with access and other support by an employer-granted "neutrality agreement" will have many months, perhaps even a year or more, to browbeat employees into signing authorization cards. But in response to all of this, the General Counsel proposes to give employees only 21 days to duplicate that effort. This is wrong and unfair.

More specifically, the General Counsel's proposal does not take into account the size and geographic scope of the proposed unit. While the union favored with a "neutrality agreement" will likely have a platoon of paid non-employee organizers (armed with employee address lists and in-plant access) to collect its signatures, is it fair to make actual workers collect signatures in just 21 days? In short, it is simply unreasonable to give employees only 21 days to collect their showing of interest.

2) The General Counsel's proposal that the showing of interest must be 50% is particularly unfair and burdensome. In no other election in the history of the Board have employees been required to produce a 50% showing of interest. See, e.g., NLRB Casehandling Manual, ¶¶ 11020-11034 (governing the 30% showing of interest); Smith's Food & Drug Centers, 320 N.L.R.B. 844, 847 (1996) ("The 30-percent figure was not chosen at random. It is the traditional figure for a showing of interest that is sufficient to raise a question concerning representation. . . . [T]he 30-percent figure seeks to harmonize 'C case' law and 'R case' law"). The General Counsel has created an arbitrary and unfair hurdle by advocating that the bar suddenly be raised to 50%. Indeed, if employees in fact muster a 50% showing of interest in only 21 days, then it seems clear that the initial grant of voluntary recognition was tainted and corrupt.

The General Counsel argues in support of a 50% threshold as follows: "Because there has already been a showing of majority that has not been challenged in a ULP proceeding, reliance on the usual 'showing of interest' for an RD election (30 percent) would be insufficient to justify an exception to the recognition bar." (G.C. Brief at 13 n.32). But this formulation begs the "question concerning representation" raised by a decertification petition supported by 30%, and makes the same unreasonable assumption as did the Board majority in Seattle Mariners, 335 N.L.R.B. 563 (2001), and the dissent in Dana Corp., 341 N.L.R.B. No. 150: that the employer-recognized union **actually** had the support of an uncoerced majority of employees at the time of recognition. The majority in Seattle Mariners and the dissent in Dana accept as a matter of faith that the UAW is a "majority union," and that the bargaining relationship was "rightfully established," simply because an interested employer says so. This unwarranted assumption is the fatal flaw in both the Dana dissent's argument, and the voluntary recognition bar itself.

Since the overarching question in these cases is **whether** the employer-recognized union, the UAW, actually had the uncoerced support of a majority of employees, Petitioners should be entitled to request an election on exactly the same terms as any other election petitioner. Creating a special 50% rule in this one class of cases places too much faith in the accuracy of the employer's initial recognition. International Ladies Garment Workers, 366 U.S. at 738-39 (cautioning the NLRB against placing employee rights "in permissibly careless employer and union hands"). Such faith is surely unwarranted given the General Counsel's understanding that "there are important differences between establishing majority status through Board elections and establishing majority status to [sic] [through] card checks," (G.C. Brief at 2), and that card checks are "less reliable" than elections. (Id. at 3). Since these observations are true, employees

who seek to challenge their employer's anointing of a favored union should not be faced with arbitrary hurdles to procure their election.

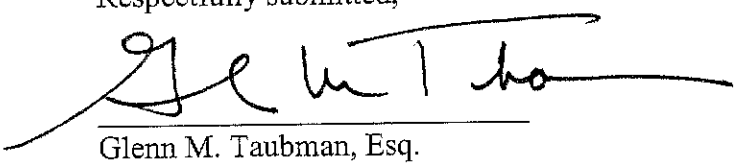
3) The General Counsel also points out, correctly, that any showing of interest will have to come from the same unit of employees that was voluntarily recognized. (G.C. Brief at 14 n.35). This makes sense, except for one detail: how will the affected employees, already under the General Counsel's 21-day deadline to collect the signatures, know who is inside or outside of the employer-recognized unit? As it stands right now, the union and employer are under no obligation to provide employees with the equivalent of an "Excelsior list." Indeed, in the Metaldyne case, Lori Yost's Declaration specifically attests to the UAW's gerrymandering of the unit to separate union supporters from union opponents, and thereby lower the bar to employer recognition. Simply stated, these and other decertification Petitioners have no way of knowing who is inside or outside of the employer-recognized units.

In short, the General Counsel's arbitrary creation of a very short 21-day time limit and a 50% showing of interest threshold provides no remedy for the Petitioners in the instant cases.

III. CONCLUSION:

The Regional Directors' dismissals of the petitions should be reversed, and the "voluntary recognition bar" abolished or greatly restricted. Immediate elections should be ordered.

Respectfully submitted,



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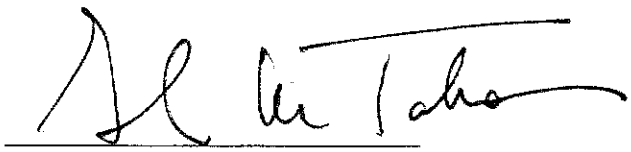

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